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NO.

in the Supreme Court of the United States

October Term, 1984

RICHARD PALUMBO,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the
Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Trial Court erred in concluding that there were exigent circumstances to justify a warrantless non-consensual entry into Petitioner's hotel room by Agents of the Drug Enforcement Agency for the purpose of making a routine felony arrest, in violation of the Fourth Amendment to the United States Constitution and the well established case law of *Payton vs. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Rakas vs. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *Chimel vs. California*, 395 U.S. 752, 89 S.Ct. 2034 (1969); *Hoffa vs. United States*, 385 U.S. 293, 87 S.Ct. 1583 (1967); *Weeks vs. United States*, 232 U.S. 383, 34 S.Ct. 341 (1914).

(2) Whether the Trial Court and/or the Appellate Court erred by misinterpreting Petitioner's defense of diminished responsibility due to the Government's failure to establish the requisite mental state for the crimes, in violation of the Fifth and Sixth amendments to the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI

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The Petitioner, RICHARD PALUMBO, prays that a Writ of Certiorari issue to review the Judgment and Opinion entered on June 7, 1984, by the United States Court of Appeals for the Eighth Circuit in a proceeding entitled: UNITED STATES OF AMERICA, Plaintiff/Appellee vs. RICHARD PALUMBO, Defendant/Appellant, Docket No. 83-2153 EM.

OPINION BELOW

The Judgment and Opinion of the Court of Appeals for the Eighth Circuit appears in the Appendix at page App. 1 of this Petition for Writ of Certiorari.

JURISDICTION

The Judgment and Opinion of the Court of Appeals was entered on June 7, 1984. A motion for extension of time in which to file a Petition for Rehearing was filed on June 19, 1984 and was subsequently granted. A Petition for Rehearing was timely filed on July 2, 1984 and was denied July 17, 1984. The jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 12.2(b) of the Federal Rules of Criminal Procedure provides:

> EXPERT TESTIMONY OF DEFENDANT'S MENTAL CONDITION. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his guilt, he shall, within the time

> provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The Court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

STATEMENT OF THE CASE

Petitioner, Richard Palumbo, was the Defendant in the case of *United States of America vs. Richard Palumbo*, Case No. 82-0098 CR (5), in the United States District Court for the Eastern District of Missouri, the Honorable Clyde S. Cahill presiding. Co-Defendant, Gary Millner pled guilty prior to trial. The jurisdiction of the Trial Court was invoked pursuant to Title 18 U.S.C. Section 801 et seq.

Petitioner was indicted in a two-count indictment on charges of wilfully, knowingly and unlawfully possessing cocaine with the intent to distribute (Title 18 U.S.C. Section 841(a)(1)) and wilfully, knowingly and unlawfully conspiring to possess cocaine with the intent to distribute (Title 18 U.S.C. Section 846). The amount of cocaine involved in this case was approximately 10 ounces (TR: 32).[1]

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[1]"TR" refers to the transcript of the hearings held on the Motion to Suppress the Evidence and the Trial, which transcript is contained in the Record on Appeal on file in the United States Court of Appeals for the Eighth Circuit.

After a non-jury trial, Petitioner was convicted of all charges.

The indictment and subsequent conviction took place as a result of the following facts:

During the winter of 1981, the Petitioner met Co-Defendant, Gary Millner (TR: 74). Millner was in Miami, Florida, looking for a place to live while attending college (TR: 75). Millner, who was from St. Louis, Missouri, returned to St. Louis and had numerous meetings with Byron Valier, a man who he had known for twelve (12) years and with whom he had previously dealt drugs (TR: 46, 78). These two men met from January through April of 1982 to discuss the purchase of cocaine (TR: 80). In February of 1982, Valier entered into an agreement with the Government to become a confidential informant (Byron Valier hereinafter referred to as the "CI") (TR: 45).

As of February, the Government was aware of the pending cocaine transaction scheduled for the middle of April. From March 19, to April 16, the exact time of the arrival of the Petitioner and Millner in St. Louis was discussed with the CI and it was decided that Petitioner and the Co-Defendant would arrive on April 16, and stay at the Stouffers Riverfront Inn (TR: 57). It is logical to assume that the Government became aware of Petitioner's impending arrival through the CI. They also recorded a conversation between the Co-Defendant and the CI on April 15 in which it was stated that Petitioner and the Co-Defendant would arrive on April 16, and stay at Stouffers. (TR: 18).

On Petitioner's arrival at Stouffers the night before the cocaine transaction, he registered in Room 678 (TR: 34). The CI subsequently spoke to the Co-Defendant and confirmed the fact that he and Petitioner were in room 678, had the cocaine, and that the narcotics transaction would take place in that room during the afternoon of the following day (TR: 57).

At no time prior to the Drug Enforcement Agency Agents' (hereinafter referred to as Agents or DEA Agents) entry into the hotel room did they attempt to obtain a search or arrest warrant (TR: 27).

The morning of April 17, the CI was outfitted by the Agents with a Kell Transmitter (TR: 19). In the early afternoon, the CI entered Petitioner's room (TR: 58). Via the Kell Transmitter, the Agents were able to hear the conversations within the room from the time of the CI's entry to the time of Petitioner's arrest (TR: 23). They did not hear any statements made during the recorded conversations which suggested: (1) that there were more than three people in the room, (those people being the CI, the Co-Defendant and Petitioner) (TR: 23); (2) that any of the people located in the room were armed (TR:24); (3) that Petitioner or the Co-Defendant were aware either that a) their conversations were being recorded or b) that Valier was a Confidential Informant (TR: 25-26); (4) that either the CI *or* the Agents located outside the room were in any danger as a result of any actions by either Petitioner or the Co-Defendant (TR: 26); or (5) that there was a *probability* that the cocaine would be destroyed before the Agents would be able to enter the room (TR: 32).

During the first stage of the cocaine sale, the CI was given a small amount so that he and the Co-Defendant could then meet with the CI's buyer (TR: 62). The balance of the cocaine was taped behind a drawer in a bureau located in the room (TR: 64). The CI then opened the door to the room, and the Agents entered and arrested the Petitioner and the Co-Defendant and had them sit on the floor near the wall (TR: 12). The CI was then taken to another room and told the Agents where the cocaine was hidden (TR: 32). The Agents then re-entered the room, and, with the Petitioner and the Co-Defendant on the floor,[2] surrounded by 4 or 5 Agents, they opened up the bureau drawer, reached behind it and removed the cocaine (TR: 12).

Petitioner's defense of Diminished Responsibility

Petitioner (who is now 25 years old) has been suffering from the degenerative disease of ulcerative colitis for 17 years (TR: 145). The disease is a serious systemic disease which involves the colon and the rectum. The major symptoms are gastrointestinal with abdominal pain, cramps, nausea, vomiting, weight loss, loss of appetite, diarrhea, bloody bowel movements, nocturnal bowel movements, malaise, anemia, anorexia and numerous other debilitating symptoms (TR: 129). The terminal end of the sigmoid and the rectum becomes scarred and a condition known as Pseudopolyposes occurs wherein the lining of the large bowel, instead of being of normal service, becomes bumpy and irregular and begins to look like polyps. This disease requires

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[2]The Petitioner and Millner were placed in handcuffs at or about the time of their arrest.

extensive care and extensive surgery. The surgery, which is referred to as a Proctocolectomy, would consist of a colectomy (removal of the colon) and a colostomy (a surgical implantation of the colon exteriorized to the abdominal wall), and then a removal of the rectum and the ilium (a portion of the small intestine). After the surgery, Petitioner will have to drain his stools into a bag several times a day.

Prior to the onset of the disease, Petitioner's mental capabilities were normal (TR: 144). Upon diagnosis Petitioner was prescribed various medications which had serious adverse mental side effects (TR: 145). These medications included: Prednisone (a steroid which is a Cortisone derivitive drug) (TR: 145), Cortisone (TR: 208), Azulfidine (TR: 145), Phenobarbitol (TR: 247), Sulfa Drugs, Immodium, and Lomotil (TR: 208). More significantly, as to the Prednisone and Cortisone drugs, the Petitioner took extremely high doses, sometimes up to 100 milligrams a day (TR: 128). The expert witnesses testified that the taking of heavy doses results in serious mental side effects and an inability to fully comprehend one's actions. Petitioner experienced these adverse mental side effects to the extent that he was incapable of forming the requisite specific intent for the crimes charged.

REASONS FOR GRANTING WRIT

The warrantless non-consensual entry into Petitioner's room, absent exigent circumstances, violated the Fourth Amendment to the United States Constitution and cases decided by this Court interpreting the Fourth Amendment.

Petitioner's arrest was unlawful and the search of his hotel room was illegal since it violated the Fourth Amendment to the United States Constitution and several Supreme Court cases interpreting the Fourth Amendment. *Payton vs. New York*, 445 U.S. 573 (1980); *Roaden vs. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973); *Coolidge vs. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). When the DEA Agents entered Petitioner's room to make the arrest, they did not have an arrest warrant or a search warrant. The record does not support the existence of exigent circumstances to justify the entry into the room.

The arrest and search took place within Petitioner's hotel room, a place which was the legal equivalent of a home for which he had the same constitutional protections. *Rakas vs. Illinois*, 439 U.S. 128 (1978); *Katz vs. United States*, 389 U.S. 347 (1967); *Hoffa vs. United States*, 385 U.S. 293 (1966); *United States vs. Bulman*, 667 F.2d 1374 (11th Cir. 1982). It is clear that Petitioner did not waive his constitutional rights to privacy because he was staying in a hotel room.

The DEA Agents had been aware of Petitioner's movements and drug related plan for more than a month prior to the arrest but failed to obtain a warrant.

The Agent's confidential informant had contacted the Co-Defendant a few months prior to the transaction to discuss the details and eventually met with Petitioner in Miami, Florida to discuss the transaction. The Agents knew when the Petitioner arrived in St. Louis and knew where the Petitioner was staying the night before the transaction took place. Well in advance of the arrest, the Agents, through the confidential informant, knew the following: (a) the location of the transaction (TR: 57, 93); (b) the amount of cocaine which was to be involved (TR: 58); (c) the price of the cocaine (TR: 58, 86); (d) the identities of the participants (TR: 48, 49); (e) "confirmation" (telephonic) that the "sellers" had the cocaine (TR: 57); and (f) that Petitioner and the Co-Defendant were the only other participants in the transaction (TR: 84, 87).

The trial transcript is clear as to when the Agents had information that a cocaine deal was to occur. The Agents knew during March of 1982 that the cocaine deal would occur in St. Louis (TR: 57, 58, 80). The Agents knew on April 16, 1982 that the transaction would be in the Stouffers Riverfront Inn and later learned that same evening (at approximately 9:30 p.m.) (TR: 92, 57) that the transaction would take place in Room 678 the next day at or around noon (TR: 370). The period of time which elapsed between the Agents' complete knowledge of the transaction and the eventual arrest of Petitioner 15 hours later was more than sufficient time to obtain a search or arrest warrant.

This was a well-planned drug raid by the Agents. It is submitted that the Government had sufficient probable cause prior to the arrest with which to obtain a search warrant and an arrest warrant, but chose not to do so. As a result of the Agents' monitoring of the

activities within the room, the Agents knew that there were no exigent circumstances to justify the entry into the room to make a routine felony arrest and search.

The United States Supreme Court has held that the Fourth Amendment to the United States Constitution prohibits the police from making a warrantless non-consensual entry into a suspect's home for the purpose of making a routine felony arrest. *Payton vs. New York, supra.* It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. Unless the search and seziure falls within one of a carefully defined set of exceptions based on the presence of exigent circumstances, the search and seizure is unreasonable. *Roaden vs. Kentucky, supra; Coolidge vs. New Hampshire, supra.* The record fails to demonstrate that exigent circumstances existed here other than those imagined by the DEA Agents.

The Agents, who had been fully aware of the planned cocaine transaction for a month or more prior to the arrest and were fully aware of the transaction approximately 15 hours in advance of the arrest, apparently neglected to prepare a solid plan to assist arresting the Petitioner. Part of the transaction included the procedure wherein the CI and the Co-Defendant would take a sample of the cocaine to the CI's buyer for approval and then the CI and the Co-Defendant would return to Petitioner's room to complete the transaction. This procedure is typical of narcotics transactions, but the Agents failed to adequately prepare for it. When the Agents realized that the Co-Defendant and the CI were going to leave the room, they then were faced with a problem which they had created. The Agents

felt that they had to enter the hotel room when the CI opened the door to leave because if they waited, they may have been confronted with a situation wherein they could have only arrested the Co-Defendant, but could not have arrested the Petitioner.

The Agents chose to enter Petitioner's room to arrest him, in violation of his Fourth Amendment rights, rather than arrest the Co-Defendant outside of the room, which they could have lawfully done.

The Government contended that the DEA Agents were justified in entering the Petitioner's room at the time they did without a warrant because of exigent circumstances. The Government argued that one or more of a myriad of circumstances could have occurred (the Petitioner could have destroyed the cocaine, the Petitioner could have caused harm to the DEA Agents [even though the Government knew, via the Kell Transmitter, that the Petitioner was unarmed]), but these possibilities cannot justify such an entry. The claimed exigent circumstances asserted by the Government consisted of the subjective beliefs of DEA Agents, beliefs which were the product of their imagination as to "possibilities" of what could have occurred had the Agents not acted when they did (TR: 11). Such subjective beliefs pertaining to mere possibilities cannot furnish justification for such an entry.

Finally, the Court of Appeals has rejected the Government's argument, in a similar case, that its delay of more than a day in obtaining a warrant (especially when the Government never did even attempt to obtain a warrant) was justified.

The Court in *United States vs. Houle*, 603 F.2d 1297 (8th Cir. 1979), stated that the Government could not be excused for undue delay (and the resultant absence of an arrest warrant or search warrant) for needlessly waiting four (4) hours before arresting a defendant in his home without a warrant.

The search of Petitioner's room, subsequent to his arrest, did not constitute a "search incident to arrest" under the Fourth Amendment to the United States Constitution or under the cases decided by this Court interpreting the Fourth Amendment

At the time the Agents conducted the search, Petitioner was under arrest, was seated on the floor, and was surrounded by 4 or 5 DEA Agents. The evidence was taped behind a closed drawer in a dresser. The closed drawer was not reasonably accessible to the Petitioner, and was, for all practical purposes, under the control of the Agents.

The Supreme Court has consistently held that the police may not conduct a search incident to an arrest once there is clearly no further danger of the arrestee obtaining evidence or weapons from the area being searched. *Chimel vs. California*, 395 U.S. 752 (1969); *Weeks vs. United States*, 232 U.S. 383 (1914). At the time of the search of the room, there no longer reasonably existed any danger that the Petitioner or Co-Defendant could obtain any evidence or weapons.

The Government contends that the search of the Petitioner's hotel room was justified as a search incident to arrest. The Government's reliance on *New York vs.*

Belton, 453 U.S. 454 (1981) and *United States vs. Brown*, 671 F.2d 585 (D.C. 1982) is misplaced. These cases, though they interpret *Chimel vs. California*, *supra*, do not furnish support for the Government's argument that the DEA Agents were justified in searching behind a dresser drawer to find evidence which was taped to the inside of the bureau when the evidence was clearly not within Petitioner's immediate control.

The Petitioner was denied due process and a fair trial, in violation of his rights under the Fifth and Sixth Amendments to the United States Constitution, by the Trial Court's and the Appellate Court's misinterpretation of his defense of diminished responsibility.

Petitioner submits that his Fifth and Sixth Amendment rights to due process and a fair trial have been violated. The Trial Court and the Court of Appeals both misinterpreted Petitioner's defense of diminished responsibility. Further the Government failed to meet its burden of proof of establishing the requisite mental state for the crimes.

The doctrine of diminished responsibility is recognized and followed in the Eighth Circuit of the United States Court of Appeals [*Hinkle vs. Scurr*, 677 F.2d 667 (8th Cir. 1982), *cert. den.* 103 S.Ct. 456; *Long vs. Brewer*, 667 F.2d 742 (8th Cir. 1982); *Zaehringer vs. Brewer*, 635 F.2d 734 (8th Cir. 1980); *Rinehart vs. Brewer*, 561 F.2d 126 (8th Cir. 1977)] and is also recognized in many other Circuits [*Brubaker vs. Dickson*, 310 F.2d 30 (9th Cir. 1962); *Rhodes vs. United States*, 282 F.2d 59 (4th Cir. 1960), *cert den.* 364 U.S. 912; *United States vs. Brawner*, 471 F.2d 969 (D.C. Cir. 1972); *United States*

vs. Munz, 504 F.2d 1203 (10th Cir. 1974), *cert. den.* 429 U.S. 1104; *United States vs. Erskind*, 588 F.2d 721 (9th Cir. 1978)] This defense is used to demonstrate that a defendant is incapable of forming the requisite mental state (specific intent as applied here) for the crimes charged due to a mental disease or defect.

The Supreme Court case of *Hopt vs. People*, 104 U.S. 631, 26 L.Ed 873 (1882) recognized the underlying concept of the defense of diminished responsbility. The Court there, in discussing the relevance of evidence pertaining to the presence of a mental state (there, due to intoxication) stated that the degree of the offense depended upon wilfulness, deliberation and premeditation. Therefore, the jury could properly consider:

> evidence [of alcohol intoxication]; "upon the ground that the *condition of the defendant's mind* at the time the act was committed must be inquired after, in order to justly determine the question as to whether his mind was capable of deliberation, or premeditation which accordingly, as there absent or present, *determines the degree of the crime*". (*Hopt*, at page 874, emphasis added).

The Court further stated that:

> "whenever the actual existence of any particular purpose, motive or *intent* is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the defendant was intoxicated at the time, in determining the purpose, motive

or *intent* with which he committed the act. (*Hopt*, at page 874, emphasis added).

Finally, the defense of diminished responsibility is specifically included in the Federal Rules of Criminal Procedure, as is set out below:

> Rule 12.2(b). EXPERT TESTIMONY OF DEFENDANT'S MENTAL CONDITION. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his guilt, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The Court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

The defense of diminished responsibility is distinctly different from the defense of insanity. For the insanity defense, one attempts to show that a given defendant is incapable of appreciating the wrongfulness of his conduct and has a complete lack of mental capacity. The defense of diminished responsibility attempts to show that the defendant is incapable of forming the requisite mental state for the crimes charged and that the defendant's ability to think, contemplate, meditate and understand the consequences and ramifications of his actions has been significantly impaired.

The defense of diminished responsibility can be used to establish the absence of the state of mind required by the existing law defining the crime, either by proving inability to entertain the state of mind or by proving that, despite the capacity to entertain that state of mind, the defendant did not in fact entertain it. This doctrine states that a person is not to be found guilty of a crime which requires specific intent as an element if that person is suffering from a mental disorder or defect, short of insanity, which prevents him from forming the requisite specific intent. The doctrine of diminished responsibility is not intended to serve as a substitute for whatever definition of legal insanity is employed in a particular jurisdiction. On the contrary, it concerns merely the admissibility of psychiatric or psychological evidence for the purpose of determining whether, in fact, a particular offense or crime was committed. Evidence of diminished responsibility is admissible as it relates to a defendant's ability to form the specific intent necessary to commit a particular crime. *Long vs. Brewer*, 667 F.2d 742 (8th Cir. 1982); *United States vs. Zink*, 612 F.2d 511 (10th Cir. 1980); *People vs. Wells*, 33 Cal.2d 330, 202 P.2d 53, *cert. den.* 338 U.S. 836 (1949); *People vs. Gorshen*, 51 Cal.2d 726, 336 P.2d 492 (1959); 21 Am Jur 2d §41; Chapter 32 "Diminished Capacity", Vol 1A of *Criminal Defense Techniques*, ed. by Michael Eisenstein, Steven W. Allen and Douglas L. Winston, pub. Matthew Bender, rev. 1983; 4 Loyola University Law Review 308, "Diminished Capacity", Grant B. Cooper (1971); and 14 Stanford Law Review 59, "Criminal Responsibility of the Mentally Ill", Bernard L. Diamond (December 1961).

The Petitioner's defense of diminished responsibility was used due to the prolonged long-term use of various

prescription medications (mostly steroids). These medications greatly impaired his ability to think clearly, to contemplate, meditate, to understand the nature and character of his actions and their consequences and to be aware of the ramifications of his actions (TR: 209, 210). All of the Petitioner's expert witnesses testified that the Petitioner was incapable of forming the requisite mental state for the crimes charged (TR: 131, 139, 140, 214, 304). The Petitioner did not raise an insanity defense nor did any of his expert witnesses testify that he was insane at the time of the commission of the crimes.

The defense need not "prove" the absence of the required mental state, but must raise some doubt concerning the Government's proof of the requisite mental state.[3] Here, the Petitioner's defense went further than was required by law and made out a prima facie case of diminished responsibility. All of his witnesses testified as to his taking of medication which had adverse mental side-effects and further testified about the aberrant behavior which resulted from the taking of such medication. The testimony of the Petitioner's witnesses supported the defense theory that the Petitioner was incapable of forming the requisite mental state for the crimes of which he was convicted.

Title 18 U.S.C. Sections 841(a)(1) and 846 are specific intent crimes. *United States vs. Hammond*, 642 F.2d 248 (8th Cir. 1981).

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[3]Chapter 32 "Diminished Capacity"; Vol 1A of *Criminal Defense Techniques*, ed by Michael Eisenstein, Steven W. Allen and Douglas L. Winston; pub by Matthew Bender, rev. 1983.

The Government failed to meet its burden of proving beyond a reasonable doubt, the specific intent requirements for the crimes charged.[4] The Government, rather, furnished testimony to support its contention that the Petitioner was *not insane*. The Government failed to establish the requisite mental state for the crimes, but also failed to offer substantial evidence to controvert Petitioner's defense of diminished responsibility. It is apparent that all of the requisite elements for the crimes charged were not proven by the Government beyond a reasonable doubt.

Both the Trial Court and the Appellate Court misinterpreted the Petitioner's defense of diminished responsibility. Both Courts instead addressed the issue of "insanity".

The Trial Court stated in its Opinion that the "defense in the case as noted earlier, was the sanity of the Defendant. . . ." (App. 25 of the Opinion of the United States District Court). The Trial Court went on to cite the American Law Institute definition of insanity, A.L.I. Section 4.01 which states as follows:

> (1) a defendant is *insane* within the meaning of these instructions, if, at the time of the alleged criminal conduct, as a result of mental disease or defect, he lacks a substantial capacity either to appreciate the wrongfulness [footnote ommitted] of his conduct or to conform his conduct to the requirements of law. (2) As used in this Article the terms 'mental disease

[4]Ibid.

> or defect' do not include any abnormality manifested only by repeated criminal or otherwise anti-social conduct. (App. 25 of the Opinion of the United States District Court for the Eastern District of Missouri, emphasis added).

The Trial court in its opinion discussed "sanity" even though the issue was not that of the Petitioner's sanity or insanity, but whether he had the ability to form the requisite mental state for the crimes charged. [Note: All of the following quotations are from the Opinion of the Trial Court: App. 26 ". . . burden of showing that the defendant was *sane* beyond a reasonable doubt."; App. 29 " the issue presented to this court, in light of all of the above, is whether Palumbo *could appreciate the nature, quality, severity and wrongfulness of his actions*. . . ."; App. 30 "Richard Palumbo suffered from no serious mental disease or defect, but had a *substantial capacity to appreciate the wrongfulness of his conduct* and possessed a *substantial capacity to conform his conduct to the requirements of law*".; App. 31 "or defect to such a degree that he could not *appreciate the wrongfulness of his act* in drug dealing, or that the could not *conform his conduct to the requirements of the law.*"]

The Appellate Court in attempting to address the Petitioner's defense of diminished responsibility, commented on the Trial Court's determination and stated, "the District Court rejected the insanity defense. . . ." (See footnote 2 at App. 6 of the Opinion of the United States Court of Appeals; emphasis added). Further, the Appellate Court, although properly stating that the Petitioner's defense at trial was that of diminished

responsibility stated, again in reference to the District Court decision, that the Petitioner "had the capacity to *appreciate the wrongfulness of his conduct* and to *conform his conduct to the law*" (App. 6 of the Opinion of the Court of Appeals; emphasis added), when such a statement is only applicable to the issue of insanity. The Appellate Court in analyzing the Petitioner's behavior, stated that the Petitioner conducted himself in a rational and business-like manner. This determination flies in the face of the testimony of Dr. Barry M. Crown, who testified that the Petitioner could demonstrate behavior which to the casual observer was proper and appropriate under the circumstances when he was in fact experiencing a psychotic episode. (TR: 236).

In light of the Trial Court's and Appellate Court's discussion of the Petitioner's defense and the fact that both Courts have viewed this defense as if it was the defense of "insanity", the Petitioner was denied due process of law and was denied a fair trial because the Courts failed to address the defense that was presented.

SUMMARY

When Government Agents enter an individual's hotel room without a warrant and absent exigent circumstances arrest him and search areas not within the person's, immediate control under the ruse of a "search incident to an arrest", this type of activity is condemned by this Court in *Payton vs. New York, supra*, and *Chimel vs. California, supra*.

It is submitted that the Circuit Court's ruling with regard to the Petitioner's Motion to Suppress the evidence is in direct conflict with *Payton vs. New York, supra, Roaden vs. Kentucky, supra*, and *Chimel vs. California, supra*, and the Fourth Amendment to the United States Constitution.

It is further submitted that the Appellate Court's and the Trial Court's rulings with regard to the Petitioner's defense of diminished responsibility and their failure to adequately address that defense violates the Petitioner's Fifth and Sixth Amendment protections under the United States Constitution.

Upon the foregoing, it is respectfully submitted that Certiorari should be granted to Petitioner RICHARD PALUMBO.

CONCLUSION

Based upon the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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BY: /s/ RICHARD B. MARX
RICHARD B. MARX

DATED: September 10, 1984

CERTIFICATE OF SERVICE

I, RICHARD B. MARX, a member of the Bar of the Supreme Court of the United States and counsel of record for RICHARD PALUMBO, Petitioner herein, hereby certify that on September 14, 1984, pursuant to Rule 28, Rules of the Supreme Court, I served three (3) copies of the foregoing Petition for Writ of Certiorari on each of the parties herein as follows:

On the United States of America, Respondent herein, by depositing such copies in the United States Post Office, Miami, Florida with first class postage, prepaid, properly addressed to the post office address of the Honorable Rex E. Lee, Solicitor General, the above named Respondent's counsel of record, at the Department of Justice, Washington, D.C. 20530.

On the United States of America, Respondent herein, by depositing such copies in the United States Post Office, Miami, Florida, with first class postage prepaid, properly addressed to the post office address of ROBERT T. HAAR, the above named Respondent's counsel of record, at 1114 Market Street, Room 414, St. Louis, Missouri 63101.

All parties required to be served have been served.

DATED: September 14, 1984.

/s/ RICHARD B. MARX

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 83-2153

UNITED STATES OF AMERICA,
Appellee,

v.

Richard Palumbo,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: March 16, 1984

Filed: June 7, 1984

Before HEANEY, BRIGHT, and McMILLIAN, Circuit Judges.

BRIGHT, Circuit Judge.

Richard Palumbo appeals from his conviction, after a bench trial,[1] of conspiracy to distribute cocaine and possession of cocaine with intent to distribute in violation of 21 U.S.C. §§846 and 841(a)(1). We affirm.

Palumbo makes two allegations of error on appeal: (1) that the district court erred in admitting into evidence

[1]The Honorable Clyde S. Cahill, United States District Judge for the Eastern District of Missouri.

cocaine seized from his hotel room by law enforcement officers upon a non-consensual, warrantless entry; and (2) that the evidence failed to establish that Palumbo formed the necessary specific intent to commit the crimes charged because he allegedly suffers from a mental disease or defect as a result of an illness and the medication prescribed therefor.

I. Background.

For approximately sixteen years, Palumbo has suffered from ulcerative colitis, a serious systematic disease involving nonspecific inflammation of the colon and the rectum. The predominant symptoms are gastrointestinal—abdominal pain, cramps, nausea, vomitting, loss of appetite, weight loss, and diarrhea. He takes, and has for many years, heavy doses of steroids to treat his condition.

The transaction leading to Palumbo's arrest and conviction had its beginnings in December of 1981 in Missouri. Palumbo's co-defendant, Gary Millner, went to the home of a friend, Byron Valier, to get some cocaine. While he was there, Millner told Valier that he had a source for cocaine in Florida. Nothing developed as a result of this conversation until March of 1982, when Valier, who was by then cooperating with government agents, went to Florida for a vacation. He contacted Millner, who had since moved to Florida, and asked him to arrange a meeting with his source. Valier, Millner, and Palumbo met on March 19, 1982, to arrange a sale. Palumbo agreed to deliver a quantity of cocaine to Valier in St. Louis and allow Valier, or his ultimate buyer, to examine it before purchasing it.

Millner and Palumbo arrived in St. Louis on April 16, 1982, and arranged with Valier to complete the sale the next day. The following morning, Millner called Valier and instructed him to come to Room 678 alone at noon with his money. When Valier entered Room 678, he was, unbeknownst to Palumbo and Millner, wearing a device to transmit their conversation to agents listening in another room. After showing Valier the cocaine, Palumbo gave a sample to Valier and Millner, who were to take it to Valier's buyer waiting in another room, allow him to inspect it, and return with the money. As Valier and Millner opened the door to leave, law enforcement officers announced their presence and, with badges displayed and weapons drawn, entered the room and arrested Millner and Palumbo. After learning from Valier where Palumbo hid the cocaine, the officers retrieved it from behind a dresser drawer.

II. Discussion.

A. Search and Seizure.

Palumbo argues that the district court erred in refusing to suppress the cocaine seized from his hotel room because (1) exigent circumstances did not justify the officers' non-consensual, warrantless entry, and (2) the warrantless search was not justified as a search incident to arrest. After reviewing the testimony at the suppression hearing, we conclude that the district court's decision to deny Palumbo's motion to suppress was not clearly erroneous.

1. **Exigent Circumstances.**

The officers originally planned that Valier would go to Palumbo's hotel room, get the cocaine sample, and take it alone to Room 684, where his "buyer," Detective Zambo, was waiting. Zambo, carrying the money to "complete the transaction," would then return to Palumbo's room with Valier to make the arrests. While Valier was in Palumbo's room, however, the officers learned, via the transmitter on Valier, that Millner intended to accompany Valier to Room 684 to get the money. This posed a problem for the officers. Because Zambo could not actually give Millner the money, he would be forced to arrest Millner in Room 684. The officers feared, however, that Palumbo would become suspicious when Millner failed to return in a short time and would destroy or remove the cocaine before they could obtain a warrant for his arrest. Their only alternative, they believed, was to arrest both Millner and Palumbo as Valier and Millner opened the door to leave. We believe that the officers' fear that Palumbo would become suspicious and destroy to cocaine was reasonable, and created an exigency sufficient to justify the warrantless entry and arrest. *See United States v. Wentz*, 686 F.2d 653, 657 (8th Cir. 1982); *United States v. Eddy*, 660 F.2d 381, 384 (8th Cir. 1981).

That the officers might have obtained a warrant before going to the hotel is not fatal to the finding that exigent circumstances justified their entry. The officers were conducting an ongoing investigation, and were not required to seek a warrant as soon as they had probable cause to suspect a conspiracy to distribute cocaine. Rather, they could legitimately wait in order to gather additional evidence of conspiracy and to establish

probable cause for the possession offense. *See United States v. Hultgren*, 713 F.2d 79, 87 (5th Cir. 1983). That the exigency might have been foreseeable does not invalidate the entry and arrest. The important point is that the exigency, while perhaps not unexpected, was not created by the officers. *Id.* at 88.

2. **Search Incident to Arrest.**

Palumbo also contends that even if exigent circumstances justified the officers' entry, their subsequent search was not justified as a search incident to arrest. Palumbo argues that the cocaine, hidden behind a dresser drawer, was inaccessible to him because he was handcuffed and in the presence of several officers. The record does not unequivocally support this assertion. Detective Zambo's testimony at the suppression hearing indicates that Palumbo was not handcuffed when the officers retrieved the cocaine from behind the drawer within an arm's reach from where Palumbo sat. Moreover, accessibility, as a practical matter, is not the benchmark. The question is whether the cocaine was in the area within the immediate control of the arrestee within the meaning of *Chimel v. California*, 395 U.S. 752, 763 (1969). This rule defines the area generally which may be searched, and is not constrained because the arrestee is unlikely at the time of the arrest to actually reach into that area. *See New York v. Belton*, 453 U.S. 454, 459-60 (1981) (police may search passenger compartment of car after police have ordered passenger to leave the vehicle); *United States v. Sanders*, 631 F.2d 1309, 1313 (8th Cir. 1980).

B. Diminished Responsibility.

At trial, Palumbo sought to establish the defense of diminished responsibility, introducing expert testimony that steroids can cause psychotic behavior and that Palumbo, because of the steroids, suffered from a mental impairment that adversely affected his ability to formulate the requisite intent. The district court rejected his defense, concluding that Palumbo suffered from no serious mental disease or disorder and had the capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the law. The district court determined, beyond a reasonable doubt, that Palumbo knowingly, willfully, and intentionally agreed to distribute cocaine and knowingly, willfully, and intentionally possessed cocaine with intent to distribute.[2]

Ample evidence supports the district court's determination. The crimes charged involved a transaction which occurred over a period of a month. In handling the transaction, Palumbo conducted himself in a rational and businesslike manner. When he met with Valier in Florida, he worked out the details of the transaction, required payment in cash, discussed the physical attributes of the cocaine he was to sell, and assured Valier as to the quality of his intended purchase. In St. Louis, he continued to orchestrate the transaction. Palumbo registered at the Stouffer's Riverfront Inn

[2]Palumbo asserts that the district court addressed an insanity defense rather than one of diminished responsibility. We disagree. The district court rejected the insanity defense and expressly found that the evidence established that Palumbo possessed the requisite intent necessary to establish his guilt.

and paid for the room. When Valier came to Room 678, Palumbo showed him the cocaine under a Panasonic light scope, discussed its quality, and scraped off a sample for Valier to take to his buyer. He also figured the purchase price of the cocaine, given the quantity for sale and the agreed-upon price.

The arrangement required Palumbo to obtain cocaine and transport it from Florida to Missouri without detection by authorities. The evidence indicates that potential detection concerned Palumbo, and that he took precautions to avoid detection. Before agreeing to meet with Valier, Palumbo asked Millner for assurances that Valier was not a police officer. He transported the cocaine by car rather than by plane because of the danger of detection in airports. On the way to St. Louis, he did not exceed the speed limit, which was unusual according to the Millner, and had a radio in the car to detect police surveillance. As they waited at the hotel to complete the transaction, Palumbo asked Millner for a description of Valier's car and watched for Valier's arrival from the window. In addition, he insisted that only Valier, and not Valier's ultimate purchaser, come to Room 678 to complete the transaction. In light of this evidence, the court did not err in concluding that Palumbo had the requisite intent to commit the crimes charged.

Affirmed.

McMILLIAN, Circuit Judge, concurring.

I fully agree with the majority opinion's analysis of Palumbo's steroid psychosis—diminished responsibility defense. I do not agree with the majority opinion's analysis of the fourth amendment issues and write

separately only to set forth my position. However, even assuming that the warrantless arrest was not justified by exigent circumstances or that the cocaine was not seized from an area within the defendants' immediate control, I think the failure to suppress was harmless error. Accordingly, I concur in the affirmance of the judgment of the district court.

First, I agree that the government agents were not required to seek an arrest or search warrant as soon as they had probable cause to suspect a conspiracy to distribute cocaine. "[T]he government may [delay an arrest] in the hope of ferreting out any hitherto unknown individuals involved in the illicit undertakings, gathering additional evidence substantiating the crimes believed to have been committed, or discovering any other offenses in which the suspects are involved." *United States v. Hultgren*, 713 F.2d 79, 87 (5th Cir. 1983). *Cf. Payton v. New York*, 445 U.S. 573 (1980) ("routine" felony arrest following investigation). *See generally* 2 W. LaFave, Search and Seizure §6.1, at 391-92 (1978 & Supp. 1984). However, the ongoing nature of the investigation is only one factor to be considered in determining the reasonableness of the warrantless arrest. *United States v. Hultgren*, 713 F.2d at 87. Another factor to be considered in determining reasonableness is the opportunity to obtain a warrant. *See Vale v. Louisiana*, 399 U.S. 30, 40 (1979) (Black, J., dissenting). Here, the agents' knowledge of the conspirators' plan was accurate and relatively complete at least several hours before the transaction was to occur; this was not a rapidly developing situation.

I am not satisfied with the government's justification for the warrantless arrest. The articulated precipitating cause of the exigent circumstances in the present case

was the government agent's inability to transfer the buy money to Millner,[1] which would have forced the agents to arrest Millner in the agents' hotel room. Millner's failure to return to Palumbo's hotel room with the money would have made Palumbo nervous and caused him to destroy or remove the cocaine before the agents could obtain a warrant. I do not doubt that this is a plausible sequence of events. However, in my opinion, the agent's understandable anxiety about the transfer of the money alone cannot justify the warrantless arrest. The agent's inability to transfer the money, although admittedly not "created" by the government in the sense that it was not purposely arranged, would be characteristic of a drug investigation where the actual transaction is effected through a third party. I would distinguish the circumstances in the present case from those in *United States v. Hultgren*, 713 F.2d at 87, in which the unexplained failure of a transmitter worn by the government informer during the transaction created the genuine concern that the informer had been discovered and that his life and those of the agents conducting the surveillance were in danger.[2]

For these reasons I would conclude that the warrantless arrest was not justified by exigent circumstances and would hold that the district court

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[1]*Cf. United States v. Joyce*, 693 F.2d 838, 840 (8th Cir. 1982) (reference to Drug Enforcement Administration guidelines prohibiting transfer of illegal drugs into physical possession of persons under investigation).

[2]The court in *United States v. Hultgren*, 713 F.2d 79, 88 (5th Cir. 1983), concluded that the district court had properly found

erred in failing to suppress all the evidence seized as a result, including the cocaine.

Alternatively, assuming that the warrantless arrest was justified by exigent circumstances, I would remand the immediate control question to the district court for additional findings and further consideration. I agree that the critical question is whether the cocaine was in an area within Palumbo's "immediate control." After reviewing the record, however, I think several points which are material to the question of immediate control were not considered by the district court. For example, Professor LaFave suggests that "the relevant facts are those which show (i) what places it would be *possible* for the arrestee *presently* to reach, and (ii), perhaps of somewhat lesser importance, how *probable* it is that the arrestee would undertake to seek means of resistance or escape or to destroy evidence," 2 W. LaFave, Search and Seizure §6.3, at 415 (emphasis in original, footnote omitted), and outlines the following factors as relevant

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(Footnote 2 Continued)

that exigent circumstances justified the warrantless arrests after considering the following factors:

> the home invaded was [that of a third party], the arrest was precipitated amidst an ongoing investigation and its attendant uncertainties, the period of time which elapsed before the exigent circumstances arose was relatively short, and the precipitating factors for the arrest [, while not unexpected,] were not deliberately created by the government.

to the question of where it would be possible for the arrestee to reach:

> (1) Whether or not the arrestee was placed in some form of restraints. . . .
>
> (2) The position of the officer vis-a-vis the defendant in relation to the place searched. . . .
>
> (3) The ease or difficulty of gaining access within the container or enclosure searched. Certainly "the accessibility of the searched area" should be taken into account. . . .
>
> (4) The number of officers present in relation to the numer of arrestees or other persons. Because "the physical control of the situation exercised by the police" is an important consideration, it is most relevant to take account of the number of police officers on the scene.

Id. at 415-16 (footnotes omitted).

In the present case it is unclear from the record whether the defendants were handcuffed at the time of the search; if so, whether they were handcuffed with their hands behind their backs, a position of restraint which would make any use of the hands much more difficult; whether the defendants were seated on the floor or in chairs or on the beds; how many agents were in the hotel room; and where the agents were positioned in relation to the defendants and the dresser. In addition, the record clearly indicates that the cocaine was *taped behind* the dresser drawer, a factor which limited its

accessibility to even a desperate arrestee. For these reasons, I would remand the immediate control question to the district court for additional findings and further consideration.

However, even assuming that the evidence seized[3] should have been suppressed, either because the warrantless arrest was not justified by exigent circumstances or, if the arrest was lawful, because the search was not of an area within the defendants' immediate control, I would conclude that the failure to suppress was harmless error. This was a bench-tried case. The remaining evidence overwhelmingly supports the district court's finding that Palumbo was guilty of conspiracy to distribute and possession with intent to distribute. The government investigation was substantially complete *before* the warrantless arrest and seizure of the cocaine, and the government informant, Palumbo's coconspirator Millner and one of the government agents testified about the conspiracy, Palumbo's involvement in the conspiracy and his possession of the cocaine. Moreover, although the cocaine and other items indicative of drug transactions were physical evidence which connected Palumbo to the criminal conduct charged, possession of the cocaine at the time of the seizure is not an essential element of the crime of conspiracy to distribute cocaine. *Cf. United States v. Byers*, 600 F.2d 1130, 1132 (5th Cir. 1979) (possession of

[3]If the arrest was unlawful, all the evidence seized from the hotel room and Palumbo's person should have been suppressed. If the arrest was lawful, all the evidence except the cocaine, which was not in plain view or in an area within the defendants' immediate control, was lawfully seized incident to arrest or in plain view.

marijuana at the time of the seizure is not an essential element of the crimes of conspiring to possess marijuana with the intent to distribute it or of conspiracy to import marijuana with the intent to distribute it). Similarly, although possession of the cocaine is an essential element of the crime of possession with intent to distribute, the government does not have to introduce the cocaine itself to establish possession.

Accordingly, I concur in the affirmance of the judgment of the district court.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[FILED (Illegible)]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 82-98 CR (4)

UNITED STATES OF AMERICA,
Plaintiff,

v.

RICHARD PALUMBO,
Defendant.

MEMORANDUM OPINION

On April 22, 1982, the grand jury for the Eastern District of Missouri returned a two count indictment charging Richard Palumbo and Gary Millner with a conspiracy to distribute cocaine, in violation of §841(a)(1), Title 21, U.S.C. On June 29, 1982, the Court accepted defendant Millner's guilty plea to Count II of the indictment. Defendant Palumbo waived his right to a trial by jury and the case was tried to the Court on May 25 and 26, 1982. For the reasons detailed below, the Court finds the defendant guilty as charged in the indictment.

The evidence at trial indicated that Gary Millner had known Byron A. Valier for several years and that during this association both Valier and Millner traded and used illegal drugs. In December of 1981 Millner went to Valier's house in order to obtain a small amount

of cocaine for the personal use of he and his friends. During the negotiation for this cocaine, Millner told Valier that he had a source for cocaine in Florida who could obtain large quantities of relatively pure cocaine. Nothing came of this conversation until several weeks later when Valier was approached by Special Agents of the Drug Enforcement Administration and asked if he would cooperate with them in some drug investigations. An agreement was subsequently reached between the Government and Valier (Government Exhibit #12) whereby in return for his cooperation Valier would not be charged with any drug offense which had a maximum term of imprisonment of over five years.

On March 10, 1982, Valier, who was then cooperating with the Government, went to Key Biscayne, Florida, for a vacation. During the time that Valier was in Florida he had several telephone conversations and meetings with Millner. Valier asked Millner to arrange a meeting with the source so that a drug sale could take place. After repeated attempts, Millner finally reached Palumbo and discussed the Valier proposal with him. Palumbo asked for assurances from Millner that Valier was not a police officer and that he had the money necessary to purchase the cocaine.

A meeting between the three eventually took place at the Key Biscayne Resort and Villa on March 19, 1982. During the conversation various details of the proposed sale were discussed. Palumbo told Valier that he could obtain large amounts of relatively pure cocaine for him. Palumbo told Valier that delivery in St. Louis was possible, that Valier could examine the cocaine prior to purchase, and that the payment had to be made in cash.

At one point during the conversation Valier showed Palumbo a quantity of powder which Valier stated was cocaine. Palumbo took some of the powder and placed it on his hand. Palumbo commented that the "cocaine" was not very good and that he could obtain some cocaine that Valier could work with. During the conversation Valier and Palumbo discussed whether the cocaine would have an "ether or acetone wash." At some point during the conversation a maid knocked on the door and uttered a statement in Spanish. Palumbo turned to the door and responded immediately in Spanish. As the meeting ended it was agreed that Valier and Millner would remain in contact and work out the details of the transaction and then contact Palumbo.

During the ensuing weeks there were several telephone conversations between Millner in Florida and Valier in St. Louis attempting to set a date for the delivery of the cocaine in St. Louis. On several occasions, however, the intended delivery was postponed.

Eventually Palumbo called Millner and stated that he was then obtaining the cocaine and would come by Millner's house in Florida that evening to begin the drive to St. Louis. Some hours later Palumbo arrived and displayed to Millner the cocaine which he had just obtained. Palumbo stated that the cocaine was very good and that Valier would be pleased with it.

Sometime prior to driving with the cocaine from Florida to St. Louis, Palumbo and Millner had a conversation about alternate methods of transportation. Palumbo stated that since dogs who could detect drugs were used at airports, air transportation was dangerous. Palumbo stated that driving the cocaine to St. Louis

would be safer. As they began the drive to St. Louis Palumbo showed Millner a radio which he had in the car. Palumbo stated that the radio could be used to detect police surveillance. Although Millner observed that Palumbo generally drove very rapidly, Palumbo stayed at the speed limit during the Florida to St. Louis trip.

Upon arrival in St. Louis, Palumbo and Millner checked into Room 678 of the Stouffer's Riverfront Inn. Palumbo asked Millner to call Valier to advise him that they were in St. Louis with the cocaine and ready to transact their business that evening. When Valier told Millner that his money was not available that evening, they agreed to finalize the arrangement the following day. That evening Millner and Palumbo went to a Cardinal's baseball game and later visited Laclede's Landing.

The following morning, Saturday, April 17, 1982, Palumbo and Millner rose at approximately 10:00 a.m. Shortly thereafter Millner called Valier to finalize their arrangements. During the waiting period, Palumbo commented to Millner that he hoped that Valier was not a police officer and that the deal would go smoothly so that they could get out of St. Louis and return to Florida. Palumbo was insistent with Millner that only Valier come into the room to transact the business and that Valier's ultimate purchaser (Detective Zambo) not be allowed into the room. Palumbo also asked Millner for the description of Valier's car. As they waited for Valier to arrive, Palumbo was looking out the window of the hotel room and eventually saw Valier's car arrive. He stated that he could not understand why the car was circling. Also that morning, Millner saw Palumbo

make some handwritten notations. (Government Exhibits 7 and 8.)

Valier eventually arrived at their room and was, unknown to Palumbo and Millner, wearing a device to record the conversation. (Government Exhibits 3a and 3b.)[1] As Valier entered the room he exchanged greeting with Palumbo. The cocaine was removed from a dresser or desk drawer and shown to Valier with a Panasonic light scope provided by Palumbo. (Government Exhibit 4.) They discussed both the quality and quantity of the cocaine Palumbo had brought. Palumbo then scraped off a sample of the cocaine and placed it on a one dollar bill. Valier and Millner were then to take the sample (Government Exhibit 1) to the room occupied by Valier's purchaser, allow an inspection of the cocaine, and return with the full purchase price. Valier opened the door to leave Room 678. DEA agents then announced their presence and with badges displayed and weapons drawn entered the room and arrested Millner and Palumbo.

Palumbo and Millner were both placed in a seated position in the hotel room and advised of their constitutional rights by DEA Task Force Detective Robert Zambo. As they were seated, within arm's reach of the desk or dresser, the cocaine was removed from the drawer and seized. (Government Exhibit 1.) From the hotel room the agents also seized the Panasonic light scope (Government Exhibit 4) and torn pieces of paper containing arithmetic notations (Government

[1]Although agents were monitoring the transmission of the conversation in Room 678, the agents at that time did not know whether other co-conspirators were in the room at the hotel and did not know whether Palumbo or Millner were armed.

Exhibit 8). From Palumbo's person were seized two conversion charts showing metric and United States weight equivalents (Government Exhibit 5), a Dial-A-Page rental agreement (Government Exhibit 6), and a piece of paper containing arithmetic notations indicating the quantity of the cocaine and its price (Government Exhibit 7).

Both Millner and Palumbo stated that they understood their constitutional rights. They were subsequently removed from the hotel room and taken before the Honorable David D. Noce, United States Magistrate, for their initial appearance. Millner and Palumbo were then conveyed to the St. Louis County Jail where they were detained over the weekend. During the weekend in the jail Palumbo made several comments to Millner about the trouble in which they currently found themselves.

During its case in chief, the United States called Bryon Valier, Gary Millner, and Detective Zambo as its witnesses. Valier related his conversations with Palumbo in Florida on March 19, 1982, and in St. Louis on April 17, 1982. He stated that at all times Palumbo conducted himself in a rational, coherent, and businesslike fashion. Milner testified as a result of a plea agreement reached with the United States in which he entered a plea of guilty to Count II of the present indictment, cooperated with the Government, and would have the United States move for an order dismissing Count I at the time of his sentencing. All cooperation provided by Millner is to be made known to the sentencing Court. Millner related his conversations with Palumbo and Palumbo's concern that Valier might be a police officer. He also related Palumbo's conversations about the danger of transporting

drugs through airports, his caution in driving to St. Louis, and the fact that he had never seen Palumbo take any prescribed medications. Both Valier and Millner identified a photograph of Palumbo (Government Exhibit 10) as what the defendant looked like during the times that they dealt with him.

Detective Zambo testified about the investigation which resulted in the warrantless arrests and seizures on April 17, 1982. He testified that at his arrest Palumbo stated that he understood each of the rights which were read to him. Detective Zambo also testified that he took a personal history of the defendant (Government Exhibit 9) and that all of the information provided by the defendant later proved to be accurate. Zambo also testified that he found no prescribed medication in any of Palumbo's personal effects.

The Government and the defense entered into a Stipulation of Anticipated Testimony that a qualified forensic chemist would testify that the sample of cocaine provided by Palumbo to Valier (Government Exhibit 1) weighed approximately .20 grams and was 79% pure cocaine. The stipulation also stated that the cocaine seized from the drawer (Government Exhibit 2) of the hotel room weighed approximately 245.10 grams and was 66% pure cocaine.

During defendant's defense both of his parents testified for him. Both related incidents surrounding the defendant's childhood and the onset of ulcerative colitis. Both noted changes in the behavior of the defendant after the onset of this disease and both testified about various periods of hospitalization and prescribed medications. Mrs. Palumbo testified that the defendant

read everything he could about ulcerative colitis and was withdrawn and distraught about the disease and with the keeping of appointments with his doctors.

Dr. Escoto's deposition was read at the trial. He diagnosed the defendant's mental disease or defect as a personality disorder further defined as an emotionally unstable personality. (Escoto Deposition p.47.) Escoto further testified that in his opinion the defendant did not have the sufficient mental capacity to appreciate the wrongfulness of his conduct on April 17, 1982. (Escoto Deposition p.25.) He testified that the prolonged use of steriods can produce psychosis, transient-psychosis, and personality changes. (Escoto Deposition p.23.)

Dr. Escoto, however, testified that Palumbo was logical, coherent, oriented to time, place, and person, suffered no impairment of remote or recent memory, suffered from no delusions or hallucinations, and was in touch with reality. Escoto Deposition pp.26-29.) He also testified that at the time of his interview Palumbo suffered from no active psychosis or organic brain dysfunction. (Escoto Deposition p.31.) Dr. Escoto also testified that:

> "he [Palumbo] was not psychotic when I talked to him. In other words, at the time he was not psychotic. He was able to talk, to be coherent in his thinking. He didn't show any evidence of psychosis—active psychosis at that time."
>
> (Escoto Deposition p.15.)

James T. O'Donnell, a pharmacist with impressive credentials, testified about the dangerous side effects

of steriods. He stated that in any amount exceeding replacement value, steroids can cause delirium, hallucination, neurosis, euphoria, and an inability to think. He testified that when treatment by steroids terminates the patient returns to his or her normal state within a brief period of time.

The deposition of Robert F. DeLuca, M.D., a board certified gastroenterologist, was also admitted into evidence at the trial. Dr. DeLuca, the physician who treated the defendant for ulcerative colitis, offered evidence about the disease itself and the recommended treatment. He stated that large doses of Prednisone and Cortisone by enema were prescribed by him for the defendant for at least five years. DeLuca testified that Prednisone can cause euphoria, inappropriate and irrational behavior, problems in intellect, memory association, orientation, and flagrant psychotic behavior, including paranoia. He added that steroids can cause facial swelling and an accumulation of fat in the trunk of the body causing what is described as a "buffalo lump." (DeLuca Deposition pp.15-16.) He added that the use of steroids can be associated with "steriod psychosis" which he explained to be a disturbance in intellect, memory, association, and orientation of the patient that can manifest itself in bizarre behavior. He added that, in his opinion, the behavior of the defendant was "consistent with steriod psychosis." (DeLuca Deposition pp.18-19). Dr. DeLuca also testified that there was no way to determine whether the defendant was actually taking the amount of drug prescribed and that there were periods when he could feel perfectly normal. (DeLuca Deposition pp.26,30.)

Barry M. Crown, Ph.D., a forensic psychologist, testified that he performed a psychological evaluation of the defendant after reviewing medical records of his prior diagnosis and treatment. Dr. Crown testified that the defendant suffered from apparent psychotic behavior and that he was unable to weigh all of the alternatives of his action. He noted that the defendant was not well organized and that his thoughts were not realistic. He added that the defendant had graduated from high school with a 3.8 average on a 4.0 scale and had done some further studies at the University of Miami.

Moisy Shopper, M.D., was the final psychiatrist called by the defense. Dr. Shopper testified that he interviewed the defendant and found him to be remorseful. Dr. Shopper testified that the defendant was not psychotic, but was socially immature and had a pervasive developmental defect. He stated that he had not read the investigative report compiled by the Drug Enforcement Administration in this matter and that his opinion regarding the defendant's ability to distinguish right from wrong would be altered had he known that Palumbo had stated to Millner his concerns that Valier might be a police officer.

In rebuttal the United States called Joseph S. Shuman, M.D. Dr. Shuman testified that he had interviewed the defendant after reviewing the investigative report. Dr. Shuman stated that the defendant suffered from no mental disease or defect recognized by the American Psychiatric Association Diagnostic & Statistical Manual of Mental Disorders (3d Ed. 1980) (DSMIII). Dr. Shuman testified that the defendant was not psychotic, schizophrenic, or suffering from any delusions or hallucinations. After reviewing the

investigative report, interviewing the defendant, and reading the reports of Drs. Escoto, Shopper, and Crown, he formed the opinion that the defendant suffered from no serious mental disease or defect, had a substantial capacity to understand and appreciate right from wrong, and had a substantial capacity to conform his conduct to the requirements of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

From the evidence detailed above the Court finds, beyond a reasonable doubt, that during the period alleged in the indictment Richared Palumbo and Gary Millner had an agreement to possess cocaine with the intent to distribute it to Byron Valier. It is clear from the evidence that Palumbo and Millner agreed to obtain cocaine in Florida, somehow transport it to St. Louis, and to eventually sell it to Valier.

It is equally clear that on April 17, 1982, Palumbo and Millner posssesed a quantity of cocaine in St. Louis which they intended to sell to Valier. It is undisputed from the evidence that on that day Palumbo and Millner did, in fact, distribute a sample of the cocaine to Valier intending that he show it to his buyer in order to accomplish a sale of the entire amount of cocaine brought to St. Louis by Palumbo and Millner.

In order to sustain its burden on Count I of the present indictment, the Government must prove beyond a reasonable doubt that:

1) Two or more persons agreed to distribute cocaine, and

2) the defendant knowingly and voluntarily joined in the agreement.

See e.g., United States v. Garcia, 655 F.2d 59 (5th Cir. 1981).

In order to sustain the charge in Count II of the present indictment, the Government must prove beyond a reasonable doubt that:

1) The defendant possessed cocaine, and

2) that the defendant possessed the cocaine with the specific intent to distribute it, and

3) that the defendant did so knowingly and intentionally.

The defense in the case, as noted earlier, was the sanity of the defendant and his ability to form the intent necessary to be held responsible for his actions.

In *United States v. Frazier*, 458 F.2d 911, 918 (8th Cir. 1972), Judge Lay, writing for the majority, stated:

> We therefore conclude that the A.L.I. [American Law Institute] test is the rule to be followed in this circuit:
>
> "(1) A defendant is insane within the meaning of these instructions if, at the time of the alleged criminal conduct, as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness [footnote

ommited] of his conduct or to conform his conduct to the requirements of law."

"(2) As used in this Article, the terms 'mental disease or defect' do not include any abnormality manifested only by repeated criminal or otherwise antisocial conduct.

A defendant's otherwise punishable conduct is, therefore, excusable if:

1) at the time of the criminal conduct, and

2) as the result of a mental disease or defect,

3) the defendant lacked a substantial capacity to appreciate the wrongfulness of his conduct, or

4) the defendant lacked a substantial capacity to conform his conduct to the requirements of law.

The question of sanity is an issue for the fact finder, unless a reasonable person, viewing the evidence in the light most favorable to the Government must necessarily possess a reasonable doubt as to the defendant's sanity. *See, e.g., United States v. Dresser*, 542 F.2d 737, 742 n.8 (8th Cir. 1976); *Dusky v. United States*, 295 F.2d 743, 755 (8th Cir. 1961), *cert. denied*, 368 U.S. 998 (1962); *United States v. Gilliss*, 645 F.2d 1269, 1277 n.21 (8th Cir. 1981). Secondly, it should be noted that lay testimony alone is sufficient for the Government to meet its burden of showing that the defendant was sane beyond a reasonable doubt. *United*

States v. Ming Sen Shiue, 650 F.2d 919, 923 (8th Cir. 1981); *Kaufman v. United States*, 350 F.2d 408, 413 (8th Cir. 1965), *cert. denied*, 383 U.S. 951 (1966). Finally, " . . . lay testimony can be sufficient to satisfy the prosecution's burden of proving the defendant's sanity, even though there is expert testimony to the contrary." *Dresser, supra*, at 742. *Dusky, supra*, at 754. Perhaps the reason for the later generality is that "in cases involving opinions of medical experts, the probative value of expert testimony is lessened when it is based [as it was in many instances in the present case] on subjective symptoms and narrative statement." *Dresser, supra* at 742. *See also, Mason v. United States*, 402 F.2d 732, 737-738 (8th Cir. 1978), *cert. denied*, 394 U.S. (1969).

The use of Prednisone was discussed in *United States v. Dresser*, 542 F.2d 737 (8th Cir. 1976). In that case the defendant was convicted of the unlawful possession of unregistered firearms in violation of §§ 5861(d) and 581(f), Title 26, U.S.C. At trial he asserted a defense of insanity.

During his own testimony Dresser stated that he took quantities of Prednisone which was prescribed for his severe attacks of bronchial asthma and emphysema. He stated on direct examination that he also experienced "confusion, extreme elation and depression" at different times. *Dresser, supra* at 741. A defense psychiatrist testified that Prednisone "could cause mental disturbance such as euphoria, depression and psychotic effects. *Id.* A second defense psychiatrist testified that Dresser lacked a substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law on the date of the offense.

This psychiatrist stated that this lack of responsibility was related to the use of Prednisone. *Id.*

On cross examination, however, the defendant conceded that he was fully aware of his actions when he constructed the unlawful bombs for which he was charged, knew how the bombs worked, and that construction of bombs had been his hobby for some time.

The second defense psychiatrist testified that his opinion regarding the defendant's lack of a substantial capacity was based upon an examination of the defendant four months after the offense and a "social history" as related by the defendant and his spouse,

The Government called two lay witnesses who had brief encounters with the defendant at the approximate time of the offense charged in the indictment. Both testified that the defendant's behavior did not appear unusual. *Dresser, supra* at 741. The arresting officer testified that he advised Dresser of his constitutional rights and that the defendant stated that he understood them. The arresting officer further testified that information which the defendant provided to him at that time had proven to be accurate and that the defendant did not appear to be confused. The agent testified that at the time of the arrest he had a reasonable conversation with the defendant

In affirming the conviction, the appellate court noted that the value of the defense psychiatrist's testimony reflecting that Prednisone was the major cause of Dresser's alleged mental problems was diminished by the statement of another psychiatrist that Dresser

did not behave in a psychotic manner under the effects of the drug. "Moreover, Dresser's own testimony indicates that he understood the nature and consequences of his actions when he constructed the pipe bombs." *Dresser, supra* at 742.

The issue presented to this Court, in light of all of the above, is whether Palumbo could appreciate the nature, quality, severity, and wrongfulness of his actions in March and April of 1982. The answer, beyond any doubt, is that he did.

It is clear that the crimes charged in this indictment were not "spur of the moment" transactions. They required Palumbo to obtain ten ounces of cocaine in Florida and have that cocaine transported, without detection, to Missouri. The record indicates that on at least two key occasions Palumbo expressed concern to Millner that Valier might be a police officer. Palumbo first sought this assurance prior to the March 19th meeting in Florida, and later while waiting for Valier to arrive at the Stouffer's Riverfront Inn on April 17th. Palumbo had a conversation with Valier in Florida concerning the quality and quantity of cocaine to be obtained. Valier characterized Palumbo during this meeting as rational, coherent, and businesslike.

Prior to coming to St. Louis with the cocaine, Palumbo explained to Millner the dangers of transporting cocaine through air terminals. Millner noted that although Palumbo generally drove very rapidly, he stayed at the speed limit during the trip from Florida to St. Louis with the cocaine. Palumbo also had with him during the trip a radio which he stated could be used to detect police surveillance.

Once in St. Louis, Palumbo made some notes clearly describing the business transaction which was the purpose of the trip. He had with him conversion charts showing weight equivalence on both the metric and United States' systems. A magnifying scope with an attached light source was brought from Florida to allow a detailed inspection of the quality of the cocaine. During the actual transfer of the cocaine and the money, Palumbo was insistent that no one other than Valier come into Room 678. It is also noted that the sample to be taken to the ultimate purchaser was selected by Palumbo. The sample was, as is the usual case, of a higher purity than the remainder.

Palumbo was able to understand the *Miranda* rights read to him by the arresting officer, Detective Zambo. The information provided by Palumbo to him regarding his personal history proved to be accurate. During their weekend in jail Palumbo made some comments to Millner about the fact that they were in trouble. In short, the acts of Palumbo in the present case were similar to the actions of drug dealers whose actions are designed to avoid arrest, and who have acted in a normal manner.

From the above the Court finds, beyond a reasonable doubt, that the defendant, Richard Palumbo, knowingly, willfully, and intentionally agreed with Gary Millner to distribute cocaine and that subsequently he knowingly, willfully, and intentionally possessed cocaine with the intent to distribute it. The court further finds, beyond a reasonable doubt, that during this period Richard Palumbo suffered from no serious mental disease or defect, but had a substantial capacity to appreciate the wrongfulness of his conduct and possessed a substantial

capacity to conform his conduct to the requirements of law.

The Court observes that defendant was, and is today, suffering from a debilitating physical condition, ulcerative colitis, and that he will probably need medical and surgical attention for his malady well into the future. But such physical maladies, troublesome and painful though they be, do not give a cloak of immunity to the defendant's criminal actions.

There is no doubt that the disease has been crippling and embarrassing and that defendant's mental attitude toward life may not be the same as that of a person in normal health. But there is no proof that he suffered from a serious mental disease or defect to such a degree that he could not appreciate the wrongfulness of his acts in drug dealing, or that he could not conform his conduct to the requirements of the law. To the contrary, the precautions he took to avoid arrest and prosecution are the clearest indicators that he recognized the illegal character of his conduct and would have been able to conform his conduct to the law had he chosen to so do.

Physical maladies alone cannot be a shield against convictions otherwise valid; to hold thus would be to license all sick and crippled people to become criminals. The physical illness of the defendant will come properly before the Court at the imposition of an appropriate sentence, which the Court will impose on July 29, 1983.

The Court finds the defendant GUILTY as charged as to both Counts 1 and 2.

SO ORDERED.

Dated this 4th day of June, 1983.

/s/ Clyde S. Cahill

Clyde S. Cahill
United States District Judge

[FILED (Illegible)]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 82-98 CR (4)

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD PALUMBO,

Defendant.

JUDGMENT AND ORDER

IT IS HEREBY ADJUDGED, DECLARED, and DECREED that the Court finds Richard Palumbo, the defendant in this action, GUILTY on both counts of the indictment.

Dated this 24th day of June, 1983.

/s/ Clyde S. Cahill
Clyde S. Cahill
United States District Judge

United States Court of Appeals
For the Eighth Circuit

No. 83-2153

September Term, 1983

Appeal from the United States District Court
for the Eastern District of Missouri.

United States of America,

Appellee,

vs.

Richard Palumbo,

Appellant.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

July 17, 1984